

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of the)	
INDEPENDENT POWER PRODUCERS COALITION)	
OF MICHIGAN against CONSUMERS ENERGY)	
COMPANY concerning violations of the Public)	
Utility Regulatory Policies Act of 1978, and)	Case No. U-17981
related Commission orders.)	
_____)	

At the January 31, 2017 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

On November 4, 2015, the Independent Power Producers Coalition of Michigan (IPPC) filed a complaint against Consumers Energy Company (Consumers) alleging violations of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 USC 2601 *et seq.* Specifically, under Count I of the complaint, IPPC alleges that Consumers is attempting to avoid its obligation under that law to enter into replacement power purchase agreements (PPAs) with IPPC members who have existing PPAs with Consumers.¹ IPPC is a coalition of independent power producers, and two of

¹ The parties have agreed that only Count I remains to be adjudicated, because Counts II and III are being addressed in Case No. U-18090. 3 Tr 16-17, 28. Count I alleges that termination of the PPAs violates PURPA and Commission orders.

its members – Hillman Power Company, LLC (Hillman) and White’s Bridge Hydro Co. (White’s Bridge) – have existing PPAs with Consumers which expire on May 31, 2017.

On December 10, 2015, Consumers filed an answer.

A prehearing conference was held before Administrative Law Judge Mark E. Cummins (ALJ) on December 15, 2015. IPPC, Consumers, and the Commission Staff (Staff) participated. The parties agreed to delay the setting of a schedule until the second prehearing, set for May 10, 2016.

On May 3, 2016, the Commission issued an order in Case No. U-18090, initiating a contested case proceeding for establishing an approved avoided cost method, and approved avoided costs and PURPA contracts, for Consumers (May 3 order).

A second prehearing conference was held on May 10, 2016. In light of the commencement of Case No. U-18090, the parties agreed to hold this proceeding in abeyance while they pursued an agreement to dismiss this action without prejudice. 2 Tr 9-10. Subsequently, the parties failed to come to such an agreement.

On October 18, 2016, IPPC filed a motion to amend its complaint and for a schedule to be set, to allow this matter to proceed. On November 4, 2016, Consumers filed a response and affidavit, and a motion to dismiss the complaint.

On November 10, 2016, a hearing was held on the pending motions. At the conclusion of the hearing, the ALJ granted the motion to amend the complaint, denied the motion to set a schedule, and denied the motion to dismiss. 3 Tr 38-41.

On November 28, 2016, IPPC filed an application for leave to appeal the denial of the request to set a schedule, pursuant to Mich Admin Code, R 792.10433 (Rule 433). On December 12, 2016, Consumers filed a response in opposition to the application.

In its application, IPPC argues that the May 3 order did not specify that the issue of contract termination would be addressed in the Case No. U-18090 proceeding. Moreover, IPPC contends, a final order in that case is not likely to be issued before May 31, 2017, thus leaving two IPPC members to suffer harm – in the form of shutting down production – if the instant matter does not proceed. IPPC states that Consumers is not in negotiations, and has refused to negotiate, with Hillman and White’s Bridge. IPPC contends that PURPA requires Consumers to purchase any energy and capacity made available from a qualifying facility (QF) such as Hillman and White’s Bridge, which IPPC terms a “must purchase” obligation. *See*, 16 USC 824a-3(a); 18 CFR 292.303(a). IPPC asserts that Consumers has a legal obligation to purchase the power, whether or not a current contract is in place. IPPC further maintains that the Commission did not indicate in the May 3 order that the legally enforceable nature of this obligation would be briefed in that case, despite the fact that it is the responsibility of the state regulatory agency, under PURPA, to make such determinations. *Id.* IPPC asserts that the shutdown of Hillman and White’s Bridge would harm those companies, their employees, and the communities where they operate.

IPPC argues that its application should be granted pursuant to Rule 433(2)(a), because it will materially advance a timely resolution of this proceeding. IPPC contends that it is entitled to a forum for its complaint, and that though Case No. U-18090 will be ripe for decision on April 7, 2017, it seems unlikely that a final unappealable order will be in place before May 31, 2017. IPPC requests that the Commission grant the appeal and require a schedule to be set, that will allow the issues of PPA extension, renewal, and termination to be decided expeditiously. Alternatively, IPPC requests that the Commission clarify that these issues will be addressed in Case No. U-18090, direct the parties to that matter to file additional testimony and briefing, and direct Consumers to extend the PPAs with IPPC members until a final order is issued in that matter.

In response, Consumers asserts that the ALJ made the right decision. Consumers contends that Count I is not ripe for a Commission determination in this proceeding. Consumers argues that the ALJ correctly decided to allow the parties more time to address Count I by resolving the issue of the expiring contracts, and notes that the ALJ expressed doubt as to whether any harm has occurred to IPPC's members. 3 Tr 39. Consumers indicates that on December 7, 2016, it made offers to Hillman and White's Bridge of new five-year contracts that would continue Consumers' current payments under the existing PPAs, subject to the final order in Case No. U-18090. The proposed PPAs will take effect once the current contracts expire. "Setting a full case schedule in this matter would only frustrate the ability of the parties to negotiate and execute these new agreements." Consumers' response, p. 7. Consumers points out that IPPC has agreed to every delay in this case thus far.

Consumers further argues that IPPC's suggestions regarding Consumers' rights under the PPAs are contrary to contract law, and that the simple fact of an expiration date does not violate PURPA. "The Company continues to acknowledge its obligation to purchase from QFs once their PPAs expire and the Company intends to negotiate new contracts based on the Company's Avoided Costs." *Id.*, p. 12. Consumers argues that the complaint fails to establish harm, and is based on stale facts. Moreover, Consumers argues, IPPC has filed testimony in Case No. U-18090 putting these same issues into contention and ensuring that they will be decided in that matter. Consumers claims that there will be no harm, because it intends to continue the terms of all expiring PPAs with eligible QFs on a month to month basis, subject to a Commission order. *Id.*, p. 18; Ronk Affidavit, p. 5.

Rule 433 establishes the standards for reviewing applications for leave to appeal. Not every application merits immediate review. An appellant must establish one of the following conditions before the Commission will grant review:

- (a) A decision on the ruling before submission of the full case to the Commission for final decision will materially advance a timely resolution of the proceeding.
- (b) A decision on the ruling before submission of the full case to the Commission for final decision will prevent substantial harm to the appellant or the public-at-large.
- (c) A decision on the ruling before submission of the full case to the Commission for final decision is consistent with other criteria that the Commission may establish by order.

Rule 433(2)(a)-(c). If the Commission grants immediate review, it will reverse an administrative law judge's ruling if the Commission finds that a different result is more appropriate.

The Commission holds the authority under PURPA to determine the nature of Consumers' obligation to purchase QF power when it is offered. *See*, October 27, 2015 order in Case No. U-17973, pp. 2-5. The ALJ found that this proceeding should be held in abeyance indefinitely so that Consumers, Hillman, and White's Bridge could "work out an extension of some nature," and Consumers indicates that a new five-year contract has been offered. 3 Tr 40. However, the simple fact of an offer does not preclude the Commission from determining the merits of Count I of IPPC's complaint, nor does it ensure that passage of the May 31, 2017 deadline – and the inability to plan expenditures and investments in the meantime – will not result in significant harm to Hillman and White's Bridge. The Commission finds that the application for leave to appeal should be granted because a decision on this question as to whether any schedule should be set will advance the timely resolution of this proceeding, and may prevent substantial harm to IPPC members. The Commission does not share the ALJ's concern that setting a schedule will only

lead to “artificial dates.” 3 Tr 40. While there is undoubtedly significant overlap of the contested issues between this case and Case No. U-18090, the Commission does not wish to preclude IPPC from having its specific claims heard in a timely manner, and the looming contract expiration deadline creates pressure in this case that is not the focus of the review taking place in Case No. U-18090 and its sister cases. Moreover, new agreements can be negotiated and executed, even if a schedule is set.

THEREFORE, IT IS ORDERED that the Administrative Law Judge shall set a schedule for adjudicating Count I of the Independent Power Producers Coalition of Michigan’s complaint.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, under MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscdockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungpl@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Sally A. Talberg, Chairman

Norman J. Saari, Commissioner

Rachael A. Eubanks, Commissioner

By its action of January 31, 2017.

Kavita Kale, Executive Secretary